AMENDED IN ASSEMBLY MARCH 2, 2010

CALIFORNIA LEGISLATURE—2009–10 REGULAR SESSION

ASSEMBLY BILL No. 1666

Introduced by Assembly Member Swanson

January 20, 2010

An act to amend Section ~~12945.2~~ *53087.6* of the Government Code, relating to ~~employment~~ *local government*.

LEGISLATIVE COUNSEL'S DIGEST

AB 1666, as amended, Swanson. ~~California Family Rights Act: sick leave.~~ *Local government: whistleblower hotline.*

Existing law authorizes a city, county, or city and county auditor or controller to maintain a whistleblower hotline to receive calls from persons who have information regarding possible violations by local government employees of state, federal, or local statutes, rules, or regulations, and requires any investigation conducted pursuant to this authorization to be kept confidential except where release of findings of a conducted investigation is deemed necessary to serve the interests of the public, except that the identity of the individual or individuals involved in the investigation is required to be kept confidential.

This bill would specify that a city, county, or city and county auditor or controller may maintain the whistleblower hotline to receive calls from persons who have information regarding fraud, waste, or abuse, and would define those terms. The bill would also authorize the auditor or controller to provide a copy of a substantiated audit report or investigation to the appropriate appointing authority for disciplinary purposes, as specified.

~~Existing law, the California Family Rights Act, permits employees of specified employers with more than 12 months of service with the~~

~~employer and who have at least 1,250 hours of service with the employer during the previous 12-month period of employment to take up to a total of 12 workweeks in any 12-month period for family care and medical leave. Existing law defines "family care and medical leave" to mean leave for the birth or adoption of a child, the serious health condition of a child, parent, or spouse, or the serious health condition of the employee.~~

~~This bill would expand the definition of "serious health condition" to include an illness contracted by the employee that has been declared a national or state emergency pandemic.~~

Vote: majority. Appropriation: no. Fiscal committee: ~~yes~~ *no*. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 53087.6 of the Government Code is amended to read:

53087.6. (a) (1) A city, county, or city and county auditor or controller who is elected to office may maintain a whistleblower hotline to receive calls from persons who have information regarding ~~possible violations~~ *fraud, waste, or abuse* by local government employees ~~of state, federal, or local statutes, rules, or regulations~~. *This section shall not prohibit any other city, county, or agency from withholding the identity of a complainant or other information pertaining to the investigation of a complaint pursuant to statutory authorization to withhold that information.*

(2) A city, county, or city and county auditor or controller who is appointed by, or is an employee of, a legislative body or the government agency that is governed by the city, county, or city and county, shall obtain approval of that legislative body or the government agency, as the case may be, prior to establishing the whistleblower hotline.

(b) The auditor or controller may refer calls received on the whistleblower hotline to the appropriate government authority for review and possible investigation.

(c) During the initial review of a call received pursuant to subdivision (a), the auditor or controller, or other appropriate governmental agency, shall hold in confidence information disclosed through the whistleblower hotline, including the identity

of the caller disclosing the information and the parties identified by the caller.

(d) A call made to the whistleblower hotline pursuant to subdivision (a), or its referral to an appropriate agency under subdivision (b) may not be the sole basis for a time period under a statute of limitation to commence. This section does not change existing law relating to statutes of limitation.

(e) (1) Upon receiving specific information that an employee or local government has engaged in an improper *government* activity, *as defined by paragraph (2) of subdivision (f),* a city or county auditor or controller may conduct an investigative audit of the matter. The identity of the person providing the information that initiated the investigative audit shall not be disclosed without the written permission of that person, unless the disclosure is to a law enforcement agency that is conducting a criminal investigation. If the specific information is in regard to improper government activity that occurred under the jurisdiction of another city, county, or city and county, the information shall be forwarded to the appropriate auditor or controller for that city, county, or city and county.

(2) Any investigative audit conducted pursuant to this subdivision shall be kept confidential, except to issue any report of an investigation that has been substantiated, or to release any findings resulting from a ~~conducted~~ *completed* investigation that ~~is~~ *are* deemed necessary to serve the interests of the public. In any event, the identity of the individual or individuals ~~involved~~ *reporting the improper government activity, and the subject employee or employees* shall be kept confidential.

(3) Notwithstanding paragraph (2), the auditor or controller may provide a copy of a substantiated audit report that includes the identities of the individuals involved and other pertinent information concerning the investigation to the appropriate appointing authority for disciplinary purposes. The substantiated audit report, any subsequent investigatory materials or information, and the disposition of any resulting disciplinary proceedings are subject to the confidentiality provisions of applicable local, state, and federal statutes, rules, and regulations.

(f) *(1)* For purposes of this section, "employee" means any individual employed by any county, city, or city and county, including any charter city or county, and any school district,

community college district, municipal or public corporation, or political subdivision that falls under the auditor's or controller's jurisdiction.

(2) For purposes of this section, "fraud, waste, or abuse" means any activity by a local agency or employee that is undertaken in the performance of the employee's official duties, including activities deemed to be outside the scope of his or her employment, that is in violation of any local, state, or federal law or regulation relating to corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty, is economically wasteful, or involves gross misconduct, incompetency, or inefficiency.

~~SECTION 1. Section 12945.2 of the Government Code is amended to read:~~

~~12945.2. (a) Except as provided in subdivision (b), it is an unlawful employment practice for any employer, as defined in paragraph (2) of subdivision (c), to refuse to grant a request by any employee with more than 12 months of service with the employer, and who has at least 1,250 hours of service with the employer during the previous 12-month period, to take up to a total of 12 workweeks in any 12-month period for family care and medical leave. Family care and medical leave requested pursuant to this subdivision shall not be deemed to have been granted unless the employer provides the employee, upon granting the leave request, a guarantee of employment in the same or a comparable position upon the termination of the leave. The commission shall adopt a regulation specifying the elements of a reasonable request.~~

~~(b) Notwithstanding subdivision (a), it is not an unlawful employment practice for an employer to refuse to grant an employee's request for family care and medical leave if the employer employs fewer than 50 employees within 75 miles of the worksite where the employee making the request is employed.~~

~~(c) For purposes of this section:~~

~~(1) "Child" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis who is either of the following:~~

~~(A) Under 18 years of age.~~

~~(B) An adult dependent child.~~

~~(2) "Employer" means either of the following:~~

~~(A) A person who directly employs 50 or more persons to perform services for a wage or salary.~~

~~(B) The state, and any political or civil subdivision of the state and cities.~~

~~(3) "Employment in the same or a comparable position" means employment in a position that has the same or similar duties and pay that can be performed at the same or similar geographic location as the position held prior to the leave.~~

~~(4) "Family care and medical leave" means any of the following:~~

~~(A) Leave for reason of the birth of a child of the employee, the placement of a child with an employee in connection with the adoption or foster care of the child by the employee, or the serious health condition of a child of the employee.~~

~~(B) Leave to care for a parent or a spouse who has a serious health condition.~~

~~(C) Leave because of an employee's own serious health condition that makes the employee unable to perform the functions of the position of that employee, except for leave taken for disability on account of pregnancy, childbirth, or related medical conditions.~~

~~(5) "FMLA" means the federal Family and Medical Leave Act of 1993 (P.L. 103-3).~~

~~(6) "Health care provider" means any of the following:~~

~~(A) An individual holding either a physician's and surgeon's certificate issued pursuant to Article 4 (commencing with Section 2080) of Chapter 5 of Division 2 of the Business and Professions Code, an osteopathic physician's and surgeon's certificate issued pursuant to Article 4.5 (commencing with Section 2099.5) of Chapter 5 of Division 2 of the Business and Professions Code, or an individual duly licensed as a physician, surgeon, or osteopathic physician or surgeon in another state or jurisdiction, who directly treats or supervises the treatment of the serious health condition.~~

~~(B) Any other person determined by the United States Secretary of Labor to be capable of providing health care services under the FMLA.~~

~~(7) "Parent" means a biological, foster, or adoptive parent, a stepparent, a legal guardian, or other person who stood in loco parentis to the employee when the employee was a child.~~

~~(8) "Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves any of the following:~~

~~(A) Inpatient care in a hospital, hospice, or residential health care facility.~~

~~(B) Continuing treatment or continuing supervision by a health care provider.~~

~~(C) For an employee taking leave pursuant to subdivision (a), an illness contracted by the employee that has been declared a national or state emergency pandemic by the President of the United States or by the Governor.~~

~~(d) An employer is not required to pay an employee for any leave taken pursuant to subdivision (a), except as required by subdivision (e).~~

~~(e) An employee taking a leave permitted by subdivision (a) may elect, or an employer may require the employee, to substitute, for leave allowed under subdivision (a), any of the employee's accrued vacation leave or other accrued time off during this period or any other paid or unpaid time off negotiated with the employer. If an employee takes a leave because of the employee's own serious health condition, the employee may also elect, or the employer may also require the employee, to substitute accrued sick leave during the period of the leave. However, an employee shall not use sick leave during a period of leave in connection with the birth, adoption, or foster care of a child, or to care for a child, parent, or spouse with a serious health condition, unless mutually agreed to by the employer and the employee.~~

~~(f) (1) During any period that an eligible employee takes leave pursuant to subdivision (a) or takes leave that qualifies as leave taken under the FMLA, the employer shall maintain and pay for coverage under a "group health plan," as defined in Section 5000(b)(1) of the Internal Revenue Code of 1986, for the duration of the leave, not to exceed 12 workweeks in a 12-month period, commencing on the date leave taken under the FMLA commences, at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of the leave. Nothing in this subdivision precludes an employer from maintaining and paying for coverage under a "group health plan" beyond 12 workweeks. An employer may recover the premium that the employer paid as~~

~~required by this subdivision for maintaining coverage for the employee under the group health plan if both of the following conditions occur:~~

~~(A) The employee fails to return from leave after the period of leave to which the employee is entitled has expired.~~

~~(B) The employee's failure to return from leave is for a reason other than the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subdivision (a) or other circumstances beyond the control of the employee.~~

~~(2) (A) Any employee taking leave pursuant to subdivision (a) shall continue to be entitled to participate in employee health plans for any period during which coverage is not provided by the employer under paragraph (1), employee benefit plans, including life, short-term, or long-term disability or accident insurance, pension and retirement plans, and supplemental unemployment benefit plans to the same extent and under the same conditions as apply to an unpaid leave taken for any purpose other than those described in subdivision (a). In the absence of these conditions an employee shall continue to be entitled to participate in these plans and, in the case of health and welfare employee benefit plans, including life, short-term, or long-term disability or accident insurance, or other similar plans, the employer may, at his or her discretion, require the employee to pay premiums, at the group rate, during the period of leave not covered by any accrued vacation leave, or other accrued time off, or any other paid or unpaid time off negotiated with the employer, as a condition of continued coverage during the leave period. However, the nonpayment of premiums by an employee shall not constitute a break in service, for purposes of longevity, seniority under any collective bargaining agreement, or any employee benefit plan.~~

~~(B) For purposes of pension and retirement plans, an employer is not required to make plan payments for an employee during a leave period, and a leave period is not required to be counted for purposes of time accrued under the plan. However, an employee covered by a pension plan may continue to make contributions in accordance with the terms of the plan during the period of the leave.~~

~~(g) During a family care and medical leave period, the employee shall retain employee status with the employer, and the leave shall not constitute a break in service, for purposes of longevity, seniority~~

~~under any collective bargaining agreement, or any employee benefit plan. An employee returning from leave shall return with no less seniority than the employee had when the leave commenced, for purposes of layoff, recall, promotion, job assignment, and seniority-related benefits such as vacation.~~

~~(h) If the employee's need for a leave pursuant to this section is foreseeable, the employee shall provide the employer with reasonable advance notice of the need for the leave.~~

~~(i) If the employee's need for leave pursuant to this section is foreseeable due to a planned medical treatment or supervision, the employee shall make a reasonable effort to schedule the treatment or supervision to avoid disruption to the operations of the employer, subject to the approval of the health care provider of the individual requiring the treatment or supervision.~~

~~(j) (1) An employer may require that an employee's request for leave to care for a child, a spouse, or a parent who has a serious health condition be supported by a certification issued by the health care provider of the individual requiring care. That certification shall be sufficient if it includes all of the following:~~

~~(A) The date on which the serious health condition commenced.~~

~~(B) The probable duration of the condition.~~

~~(C) An estimate of the amount of time that the health care provider believes the employee needs to care for the individual requiring the care.~~

~~(D) A statement that the serious health condition warrants the participation of a family member to provide care during a period of the treatment or supervision of the individual requiring care.~~

~~(2) Upon expiration of the time estimated by the health care provider in subparagraph (C) of paragraph (1), the employer may require the employee to obtain recertification, in accordance with the procedure provided in paragraph (1), if additional leave is required.~~

~~(k) (1) An employer may require that an employee's request for leave because of the employee's own serious health condition be supported by a certification issued by his or her health care provider. That certification shall be sufficient if it includes all of the following:~~

~~(A) The date on which the serious health condition commenced.~~

~~(B) The probable duration of the condition.~~

~~(C) A statement that, due to the serious health condition, the employee is unable to perform the function of his or her position.~~

~~(2) The employer may require that the employee obtain subsequent recertification regarding the employee's serious health condition on a reasonable basis, in accordance with the procedure provided in paragraph (1), if additional leave is required.~~

~~(3) (A) In any case in which the employer has reason to doubt the validity of the certification provided pursuant to this section, the employer may require, at the employer's expense, that the employee obtain the opinion of a second health care provider, designated or approved by the employer, concerning any information certified under paragraph (1).~~

~~(B) The health care provider designated or approved under subparagraph (A) shall not be employed on a regular basis by the employer.~~

~~(C) In any case in which the second opinion described in subparagraph (A) differs from the opinion in the original certification, the employer may require, at the employer's expense, that the employee obtain the opinion of a third health care provider, designated or approved jointly by the employer and the employee, concerning the information certified under paragraph (1).~~

~~(D) The opinion of the third health care provider concerning the information certified under paragraph (1) shall be considered to be final and shall be binding on the employer and the employee.~~

~~(4) As a condition of an employee's return from leave taken because of the employee's own serious health condition, the employer may have a uniformly applied practice or policy that requires the employee to obtain certification from his or her health care provider that the employee is able to resume work. Nothing in this paragraph supersedes a valid collective bargaining agreement that governs the return to work of that employee.~~

~~*(l)* It is an unlawful employment practice for an employer to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against, any individual because of any of the following:~~

~~(1) An individual's exercise of the right to family care and medical leave provided by subdivision (a).~~

~~(2) An individual's giving information or testimony as to his or her own family care and medical leave, or another person's family care and medical leave, in any inquiry or proceeding related to rights guaranteed under this section.~~

~~(m) This section shall not be construed to require any changes in existing collective bargaining agreements during the life of the contract, or until January 1, 1993, whichever occurs first.~~

~~(n) The amendments made to this section by Chapter 827 of the Statues of 1993 shall not be construed to require any changes in existing collective bargaining agreements during the life of the contract, or until February 5, 1994, whichever occurs first.~~

~~(o) This section shall be construed as separate and distinct from Section 12945.~~

~~(p) Leave provided for pursuant to this section may be taken in one or more periods. The 12-month period during which 12 workweeks of leave may be taken under this section shall run concurrently with the 12-month period under the FMLA, and shall commence the date leave taken under the FMLA commences.~~

~~(q) In any case in which both parents entitled to leave under subdivision (a) are employed by the same employer, the employer is required to grant leave in connection with the birth, adoption, or foster care of a child that would allow the parents family care and medical leave totaling more than the amount specified in subdivision (a).~~

~~(r) (1) Notwithstanding subdivision (a), an employer may refuse to reinstate an employee returning from leave to the same or a comparable position if all of the following apply:~~

~~(A) The employee is a salaried employee who is among the highest paid 10 percent of the employer's employees who are employed within 75 miles of the worksite at which that employee is employed.~~

~~(B) The refusal is necessary to prevent substantial and grievous economic injury to the operations of the employer.~~

~~(C) The employer notifies the employee of the intent to refuse reinstatement at the time the employer determines the refusal is necessary under subparagraph (B).~~

~~(2) In any case in which the leave has already commenced, the employer shall give the employee a reasonable opportunity to return to work following the notice prescribed by subparagraph (C).~~

~~(s) Leave taken by an employee pursuant to this section shall run concurrently with leave taken pursuant to the FMLA, except for any leave taken under the FMLA for disability on account of pregnancy, childbirth, or related medical conditions. The aggregate~~

~~amount of leave taken under this section or the FMLA, or both, except for leave taken for disability on account of pregnancy, childbirth, or related medical conditions, shall not exceed 12 workweeks in a 12-month period. An employee is entitled to take, in addition to the leave provided for under this section and the FMLA, the leave provided for in Section 12945, if the employee is otherwise qualified for that leave.~~

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